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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. KENNETH NATHANIEL WILSON, Defendant and Appellant.	2d Crim. No. B211143 (Super. Ct. No. 1282240) (Santa Barbara County)

Kenneth Nathaniel Wilson appeals from the judgment entered after a jury convicted him of assault with a deadly weapon. (Pen. Code, § 245, subd. (a)(1).)[1] The trial court sentenced appellant to three years state prison.

Appellant claims that the trial court committed evidentiary and instructional errors, that he was denied the right to cross-examine witnesses, and that the trial court erred in not granting a request to view the crime scene or permitting appellant to be present denying a readback of testimony. We affirm

Facts and Procedural History

On April 21, 2008, appellant saw Armando Vidal and Ronnie Zamora outside a Lucky 7 Market in Santa Maria. Appellant was upset about a sexual remark that Zamora had made. Appellant apologized and shook hands with Zamora.

[1] All statutory references are to the Penal Code unless otherwise stated.

Appellant offered to shake Vidal's hand. Vidal said that he did not even know appellant, refused to shake his hand, and left with Zamora.

Angered by Vidal's response, appellant went to Allen Hammon's house where Vidal and Zamora lived. When Zamora and Vidal returned, appellant and Hammon were in the living room. Vidal did not want to talk and stayed in the laundry room on the back porch. Appellant repeatedly asked Vidal to shake his hand. Vidal refused, angering appellant. Without warning, appellant charged Vidal, and pulled out and swung a machete, striking Vidal on the chin. Vidal stepped back, opened a six-inch pocketknife, and tried to defend himself as appellant said, "Shake my hand, shake my hand." Taking two more steps back, Vidal yelled, "Call the cops. Call the cops." Appellant pointed the machete at Zamora and Allen in the living room and said, "Don't you dare call the cops."[2]

Vidal retreated to the backyard, threw the knife aside, and grabbed a rake to defend himself. Appellant took Vidal's backpack and dropped the backpack before riding off on a bicycle. Hammon did not want the police at the house and refused to let Vidal use the phone. Vidal and Zamora went to the police station an hour later and gave statements to Officer Jesus Valle. The next day, Vidal and Zamora saw appellant outside a liquor store and called the police. They responded and contacted appellant. Appellant was irate. He denied that he was involved in "any type of incident" the day before. When appellant was told that he was being arrested for assault with a deadly weapon, he said: "Let's squash this right now. I can help you out. What do you need?"

At trial, appellant testified that Vidal was the aggressor and came at him with a knife. Appellant claimed that he drew a Bowie knife in self-defense, slapped Vidal with it, and turned and ran.

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[2]The jury returned a not guilty verdict on count 2 for dissuading a witness (Zamora and Hammon) by force or threat (§ 136.1, subd. (c)(1)).

Self-Defense Instructions

Appellant contends that the trial court failed to adequately instruct on self-defense, denying appellant his due process right to a fair trial. The jury received five CALCRIM 3470 self-defense instructions, one of which paraphrased CALJIC 5.51 (Self-Defense - Actual Danger Not Necessary) on apparent danger.[3] (See Exhibit A.) A printed copy of the instruction was furnished to the jury but had a diagonal line drawn across the text which appellant claims may have confused the jury. (See Exhibit A.)

It is uncontroverted that the trial court read the instruction to the jury. Appellant concedes "[t]here is no constitutional right to have a physical copy of the jury instructions with the jury during deliberations." (*People v. Blakely* (1992) 6 Cal.App.4th 1019, 1023.) Assuming, arguendo, that the jury disregarded the crossed-out instruction, the alleged error was harmless. The trial court gave five "Right to Self Defense" instructions, four of which set forth the applicable law on self-defense. The fifth instruction with the diagonal line states: "Actual danger is not necessary to justify self-defense. If one is confronted by the appearance of danger which arouses in his mind, as a reasonable person, an actual belief and fear that he is about to suffer bodily injury, and if a reasonable person in a like situation, seeing and knowing the same facts, would be justified in believing himself in like danger, and if that individual so confronted acts in self-defense upon these appearances and from that fear and actual

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[3] The record includes a settled statement which states that the trial court "orally instructed the jury. [Citation.] While reading the instructions to the jury, the court projected the text of the jury instructions on a large screen by means of an ELMO projector. Included in the instructions was CALCRIM No. 3470, Right to Self-Defense. This instruction was modified to include the text of CALJIC Instruction 5.51, 'Self-Defense – Actual Danger Not Necessary.' . . . [¶] The printed copy of CALCRIM No. 3470 contained in the Santa Barbara County Superior Court file has a pencil or pen line drawn through the center of the CALJIC text. . . . It also contains marks above and below the title '3470. Right to Self-Defense.' These markings were photocopied onto the copy of the instructions which was sent into the jury room during deliberations."

beliefs, the person's right of self-defense is the same whether the danger is real or merely apparent."

The crossed-out text is a pinpoint instruction and cumulative of the other self-defense instructions which state: "If the defendant's beliefs were reasonable, the danger does not need to have actually existed." (CALCRIM 3470.) The trial court had no sua sponte duty to restate the principle in the negative. (See *People v. Harris* (1971) 20 Cal.App.3d 534, 538-539.)

Assuming, arguendo, that the jury did not consider the lined-out instruction, there was no prejudice. Appellant testified that Vidal was the aggressor and came at him with a knife before appellant drew the machete. The self-defense claim was based on actual danger, not apparent danger. Because the lined-out instruction was inconsistent with the defense theory of the case, the trial court had no sua sponte duty to give it. (*People v. Barton* (1995) 12 Cal.4th 186, 195.) " '[A] trial court need not give a pinpoint instruction if it is argumentative [citation], merely duplicates other instructions [citation], or is not supported by substantial evidence [citation.]' [Citation.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 99.)

Appellant speculates that the jury construed the diagonal line to mean that it should not only disregard the instruction but assume that a reasonable belief in danger does not justify self-defense. The jury, as demonstrated by its written questions, was willing and capable of asking questions to clarify any ambiguity it perceived in the instructions. The jury was instructed that in order to convict for assault with a deadly weapon, the prosecution had to prove that appellant acted "*willfully* or on purpose" and "did not act in self-defense." (CALCRIM 875, 3470.) It did not ask if the diagonal line meant anything or indicate that it had a problem with the instructions. Some of the printed instructions had bullet points, computer generated boxes and cutouts, and large print. It would be a leap of logic to assume that the jury construed a print anomaly or mark to be a signal that an instruction meant something different than what it said.

We conclude that the alleged instructional error, i.e., a lined-out mark on a printed jury instruction, was harmless beyond a reasonable doubt. (*People v. Huggins* (2006) 38 Cal.4th 175, 193.) Criminal defendants are entitled to fair trials, not perfect trials. (*People v. Bradford* (1997) 14 Cal.4th 1006, 1057.)

Jury Questions

Appellant argues that the trial court's responses to certain jury questions were inadequate. During deliberations, the jury asked for a readback of testimony and submitted written questions.[4] At the suggestion of defense counsel, the trial court referred the jury back to the self-defense instructions and instructed that the jurors must determine the facts and "use the instructions to guide them to a verdict."

Appellant did not object and is precluded from arguing, for the first time on appeal, that the responses are inadequate. (See *People v. Roldan* (2005) 35 Cal.4th 646, 729, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The jury was redirected to the self-defense instructions which are full and complete. No more was required. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1213.) "The trial court was not required to furnish an instruction exhorting the jury to refrain from considering factors which, under a reasonable understanding of the jury instructions, it should have known were improper to consider." (*People v. Welch* (1999) 20 Cal.4th 701, 766.)

We reject the argument that the trial court erred in responding to the jury questions as it did. (*People v. Noguera* (1992) 4 Cal.4th 599, 642-643; see e.g., *People v. Briscoe* (2001) 92 Cal.App.4th 568, 589 [comments that diverge from the standard jury instruction are often risky].) "Jury questions can present a court with particularly vexing challenges. The urgency to respond with alacrity must be weighed against the need for precision in drafting replies that are accurate, responsive, and

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[4] The jury asked: "Is it considered self defense if someone looks around in the house looking for someone?" It also asked: "Is the fact that Mr. Vidal had his knife open and exposed considered aggressive enough for a self defense claim?"

balanced. When a question shows the jury has focused on a particular issue, or is leaning in a certain direction, the court must not appear to be an advocate, either endorsing or redirecting the jury's inclination." (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1331.)

A more detailed response could have confused the jury and relieved the jury from making findings on relevant issues. (*People v. Mobley* (1999) 72 Cal.App.4th 761, 781.) Having reviewed the record, we conclude that it is not reasonably likely that the jury was confused by the trial court's responses or misconstrued or misapplied the instructions on self defense. (*People v Clair* (1992) 2 Cal.4th 629, 663.) Appellant makes no showing that the alleged errors resulted in a miscarriage of justice. (*People v. Breverman* (1998) 19 Cal.4th 142, 173.)

Cross-Examination of Victim

Appellant argues that he was denied the right to cross-examine witnesses about prior drug use. At an in limine hearing (Evid. Code, § 402), appellant asked if it was true that Vidal invited appellant to smoke methamphetamine a week before the assault. Vidal denied ever using methamphetamine or inviting appellant to do so, and denied smoking marijuana or ingesting drugs the day of the assault.

Defense counsel argued that appellant would testify that Vidal invited appellant to smoke methamphetamine and was angry when appellant declined. Defense counsel claimed that it showed "a partial motive" for Vidal, Zamora, and Hammon to fabricate statements about the April 21, 2008 assault. The trial court ruled that this evidence was not relevant.

At trial, Vidal admitted telling the police that appellant was "a meth-head." Defense counsel asked: "And is that because you had asked to smoke meth with [appellant] on a variety of occasions?" After the trial court sustained an objection, defense counsel asked the question again and was cited for contempt.[5]

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[5] Defense counsel asked, "Isn't it true that the first day you met Ken Wilson, you asked him three times to smoke methamphetamine with him?"

The trial court correctly found that Vidal could not be cross-examined about an irrelevant matter in the hope that Vidal would answer falsely. (See *People v. Lavergne* (1971) 4 Cal.3d 735, 744.) Appellant makes no showing "that the prohibited cross-examination would have produced 'a significantly different impression' " of Vidal's credibility or that there was a violation of appellant's right of confrontation and cross-examination. (*People v. Frye* (1998) 18 Cal.4th 894, 946.) The constitutional right to cross-examine witnesses does not permit defense counsel to inquire about irrelevant matters or preclude other reasonable limitations on the scope of cross-examination. (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428 [application of state rules of evidence do not impermissibly impair defendant's right to present a defense].)

Appellant argues that the trial court erred in excluding questions about Vidal's and Zamora's drug use. The trial court ruled that appellant could not ask about prior drug use, but could ask if Vidal and Zamora were under the influence the day of the assault. There was no abuse of discretion. (Evid. Code, § 352.)

The trial court's treatment of the issue was correct and did not violate appellant's constitutional rights. (*People v. Wilson* (2008) 44 Cal.4th 758, 794.) There was no evidence that Vidal and Zamora ingested drugs the day of the assault or that they were habitual drug users. "Evidence of habitual narcotics . . . use is not admissible to impeach perception or memory unless there is expert testimony on the probable effect of such use on those faculties. [Citations.]" (*People v. Balderas* (1985) 41 Cal.3d 144, 191.)

Assuming that the trial court erred in limiting cross-examination, the alleged error was harmless. Officer Valle interviewed Vidal and Zamora an hour after the assault and observed no signs of intoxication or drug use. "[T]he testimony of both witnesses was clear and direct and betrayed no suggestion their recall . . . was at all impaired by their previous drug use." (*People v. Wilson, supra*, 44 Cal.4th at p. 794.)

Prosecutorial Misconduct

Appellant asserts that the prosecutor committed prejudicial misconduct when he asked appellant if Vidal was lying.[6] Appellant objected only on vagueness grounds. He waived any claim of prosecutorial misconduct. To preserve the issue on appeal, the defendant must make a timely objection and request an admonition. (*People v. Farnam* (2002) 28 Cal.4th 107, 167.)

The question about whether Vidal was lying was not misleading or prejudicial. (See e.g., *People v. Chatman* (2006) 38 Cal.4th 344, 382-383.) Appellant and Vidal gave different accounts about who was the aggressor and whether appellant drew and swung the machete without warning. Appellant claimed that Vidal came at him with a knife, forced him out of the house, and chased him off with a rake. The defense theory was that Vidal went to the police not to report a crime, "but to cover one up."

The prosecution could ask appellant why appellant's account of what transpired was different from that of other witnesses and, in that context, whether Vidal was lying. (*Id*., at p. 383.) "The prosecution's questions allowed defendant to clarify his position and to explain why . . . eyewitness [Vidal] might have a reason to testify falsely. The jury properly could consider any such reason defendant provided; if defendant had no explanation, the jury could consider that fact in determining whether to credit defendant's testimony. [Citation.] Thus, the prosecution's questions in this case 'sought to elicit testimony that would properly assist the trier of fact in

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[6] "Q. [Prosecutor]: You got angry because he wouldn't shake your hand, and you continued to get angry?
"A. [Appellant] No sir.
"Q. And your raised your voice?
"A. No sir.
"Q. And without provocation, You swung the machete at him?
"A. No sir.
"Q. So Mr. Vidal is lying?
"A. I don't understand..
"Q. I think the question is pretty straightforward. I am asking you if Mr. Vidal was lying on testimony."

ascertaining whom to believe.' [Citation.] There was no prosecutorial misconduct." (*People v. Tafoya* (2007) 42 Cal.4th 147, 179.)

Even if we assumed that the "is he lying" question was improper, there was no prejudice. The discrepancies between appellant's account of the events and that of Vidal were stark. The jury was aware of the discrepancies and were instructed: "Nothing that the attorneys say is evidence" and "[d]o not assume that something is true just because one of the attorneys asked a question that suggested it was true." (CALCRIM 222.) We presume that the jurors understood and followed the instructions. (*People v. Gray* (2005) 37 Cal.4th 168, 217.) There is no likelihood that appellant would have achieved a better result had the "is he lying" question not been asked. (*People v. Riggs* (2008) 44 Cal.4th 248, 300-301.)

Request to View Crime Scene

Appellant asserts that the trial court abused its discretion in denying a defense motion to view the crime scene. (§ 1119 [jury may view crime scene when trial court believes it proper].) Appellant argued that the photos did not fully depict the service porch and that the house owner, Hammon, had denied a defense investigator access to the porch area.

The trial court reasonably concluded that a crime scene visit would be too time consuming, would present difficulties transporting the jury and court staff, and was marginally probative. (Evid. Code, § 352; *People v. Price* (1991) 1 Cal.4th 324, 422.) A request to view the crime scene may be denied where there are other means of testing the veracity of witnesses such as photos or diagrams. (*People v. Lawley* (2002) 27 Cal.4th 102, 158-159; *People v. Fudge* (1994) 7 Cal.4th 1075, 1104-1105; see e.g., *Bundy v. Dugger* (11th Cir. 1988) 850 F.2d 1402, 1421-1422 [photos in lieu of crime scene view; no due process violation].)

Photos of the crime scene were received into evidence and Zamora and Vidal were questioned about the photos and a house diagram. A defense investigator

visited the house twice and testified about the porch area and house configuration.[7] Appellant makes no showing that it is reasonably likely he would have obtained a more favorable verdict had the jury visited the crime scene. (*People v. Lawley, supra,* 27 Cal.4th at p. 158.)

Readback of Testimony

During deliberations, the jury asked for a readback of appellant's testimony in which appellant stated that Vidal "never swung the knife." The trial court ordered a readback of the testimony in the jury deliberation room. Citing *People v. Pride* (1992) 3 Cal.4th 195 and *People v. Rhoades* (2001) 93 Cal.App.4th 1122, the court denied appellant's request to be present during the readback.

Appellant argues that his due process rights were violated but no federal or state constitutional violation occurs when a readback is conducted outside the presence of the defendant. (*People v. Cox* (2003) 30 Cal.4th 916, 963.) Although section 977 provides that a defendant should be present at all proceedings, the readback of testimony "is not an event that bears a substantial relation to the defendant's opportunity to
defend. . . ." (*People v. Horton* (1995) 11 Cal.4th 1068, 1121.)

There is nothing in the record to indicate that appellant's presence during the readback would have assisted the defense. "Because [appellant] provides no basis on which we could conclude the result of his trial would have been different had he been present at the readback [citation], we find the violation of section 977 was harmless. For the same reason, [appellant's] absence at the readback did not offend his constitutional rights to due process or a fair and reliable trial." (*People v. Avila* (2006) 38 Cal.4th 491, 598.)

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[7] On the first visit, Vidal showed the investigator where he was assaulted. On the second visit, the investigator decided not to photograph the service porch because a German Shepard was in the room.

Appellant's remaining arguments have been considered and merit no further discussion. Appellant's guilt was clearly established by the evidence. The alleged errors, either singularly or cumulatively, did not prejudice appellant or deny him a fair trial.

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P.J.

We concur:

COFFEE, J.

PERREN, J.

Zel Canter, Judge

Superior Court County of Santa Barbara

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